



# Arizona State Senate **Background Brief**

September 26, 2008

## **Note to Reader:**

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## **LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS**

### **INTRODUCTION**

Federal immigration law prohibits persons from entering the United States illegally and provides penalties for entering or reentering the U.S. illegally. The Immigration and Nationality Act (INA) of 1952 was the first codification of immigration and nationality law and is still the basic code. There are civil and criminal violations of immigration law. Civil violations include failing to depart after the expiration of a visitor visa or after the alien's student status changes. Criminal violations include illegal entry, reentry after deportation and willfully failing to depart after an order of removal. Currently, federal immigration issues are primarily enforced by the federal government. In exercising its power to regulate immigration, however, Congress is free to delegate to the states, among other things, the activities of arresting, holding and transporting aliens.

Congress has created opportunities for the participation of state and local officers in the enforcement of federal immigration laws. In 1996, Congress specifically authorized arrest by state and local officers of immigrants who are illegally present in the country and who were previously convicted of a felony offense after which the person left the U.S. or was deported, to the extent permitted by relevant state and local law. Arresting officers must confirm with immigration authorities the person's status, and the person can be held only for such time as it takes for federal authorities to respond and take the person into custody.

Additionally, U.S. code allows all officers who enforce criminal laws to make arrests for smuggling, transporting or harboring criminal aliens. State and local officers may exercise the civil or criminal arrest powers of federal immigration officers when all of the following are true: 1) when expressly authorized by the U.S. Attorney General; 2) when given consent by the head of the state or local law enforcement agency; and 3) upon the U.S. Attorney General's determination of an emergency due to a mass influx of unauthorized aliens. Any authority given by the U.S. Attorney General to state law enforcement officers under this provision can only be exercised during the emergency situation.

## OTHER RELEVANT FEDERAL LAWS

The U.S. Immigration and Customs Enforcement (ICE) is required to respond to inquiries by federal, state or local government agencies seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency, for any purpose authorized by law, by providing the requested verification or status information.

In 1996, Congress passed Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act) and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Immigration Reform Act). This legislation prohibits a federal, state or local government entity or official from limiting employees in voluntarily sending to or receiving from the Immigration and Naturalization Service (now ICE) information regarding the citizenship or immigration status of any individual, or from maintaining or exchanging with another government entity such information.

The Immigration Reform Act also added Section 287(g) regarding performance of immigration officer functions by state officers and employees. This section authorizes the secretary of the U.S. Department of Homeland Security (U.S. DHS) to enter into agreements with state and local law enforcement agencies to allow designated officers to perform a function of a federal immigration officer in investigating, apprehending or detaining unauthorized aliens in the U.S., including the transportation of unauthorized aliens across state lines to detention centers. The officer or employee must have knowledge of, adhere to and have received adequate training regarding federal immigration laws, and function under the supervision of sworn ICE officers. However, such an agreement is not required for an officer or employee to communicate regarding the immigration status of any individual, or otherwise cooperate with federal officials in identifying, apprehending, detaining or removing unauthorized aliens. For federal fiscal year 2006, Congress appropriated \$5 million for states and localities that enter into such agreements.

## CASE LAW

Parts of the aforementioned federal statutes were upheld by the U.S. Court of Appeals in 1999 (*City of New York v. United States*, 179 F.3d 29). New York City's Executive Order No. 124, issued by Mayor Koch in 1989, prohibited city employees from voluntarily providing federal immigration authorities information pertaining to the immigration status of any alien. Because the Welfare Reform Act and Immigration Reform Act preempted the Executive Order, the city and its mayor challenged the facial constitutionality of the sections related to the voluntary provision of immigration information to federal officers. Limiting its holding to the facial effect of the federal statutes on Executive Order No. 124, the Court held that because Congress did not compel state and local governments to enact or administer any federal regulatory program and the federal statutes did not alter the city's government, the acts did not violate the Tenth Amendment or the guarantee clause. Therefore, the statutes nullified the Order. The U.S. Supreme Court denied a petition for review of the Court of Appeals' decision, thereby letting the opinion stand.

A recent U.S. Supreme Court decision indicates that law enforcement officers may question criminal suspects and detainees about their immigration status in certain circumstances. An occupant of a house at which police were executing a search warrant was detained while the search was in progress, given the fact that the warrant sought weapons and evidence of gang membership. The Court held that the officers needed no independent reasonable suspicion in order to question the occupant, and that because her initial detention was lawful, asking her about her immigration status did not violate her Fourth Amendment rights, as long as the questioning did not prolong her detention (*Muehler v. Mena*, 544 U.S. 93).

## LOCAL ENFORCEMENT POLICIES

Various municipalities have adopted policies that formally or informally prohibit law enforcement officers from stopping someone for the sole purpose of determining immigration

status, arresting a person when the only violation is an infraction of federal immigration law or informing federal immigration authorities, under certain circumstances, of the presence of an unauthorized alien. These policies are commonly referred to as “sanctuary” policies.

In 2006, a City of Phoenix ballot measure was proposed that, if approved, would have required all officials, agencies and personnel of the City of Phoenix to comply with and support the enforcement of federal immigration law. The measure also would have specified that officials, personnel or agents cannot be prohibited from sending, receiving or maintaining information regarding the immigration status of any individual, or exchanging such information with any other federal, state or local government entity for specified purposes. Finally, the initiative would have required the Phoenix Police Department to enter into an agreement with the U.S. DHS to designate officers as immigration officers. Proposition 405, however, was taken off the ballot because it lacked the necessary number of signatures to qualify.

On December 3, 2007, Phoenix Mayor Phil Gordon informed the Phoenix City Manager and the Chief of the Phoenix Police Department that he no longer supports the city’s policy. He requested that two former U.S. Attorneys, a former Arizona Attorney General and a former Maricopa County Attorney work with the Phoenix Police Department to draft a new policy by December 31, 2007, that will allow individual officers to notify ICE when any law has been violated by a person they have reason to believe is in the U.S. illegally. He requested that the new policy establish that all state and federal constitutional guarantees be met and ensure that no racial or ethnic profiling occur.

In May 2008, the City of Phoenix Police Department announced a revision of the department’s immigration policy. Some provisions related to enforcement of immigration law remain the same. Specifically, officers still may not contact or stop persons for the sole purpose of determining immigration status, and victims and witnesses of crimes will not be questioned about their immigration status.

The revised policy makes the following changes: 1) all arrested persons will be questioned about their immigration status; 2) officers may transport subjects who have a valid criminal warrant for federal immigration violations to ICE with a supervisor’s approval; 3) officers may forward a person’s personal information to ICE if the officer develops information during a valid noncriminal contact that leads the officer to believe the person is in the country illegally; and 4) officers may contact ICE to access federal databases to further a criminal investigation, with supervisory approval. According to Phoenix Police Chief Jack Harris, officer interactions with ICE will be documented and subject to supervisory review and routine audits will be conducted by the department.

## **STATE AGENCY ENFORCEMENT**

The Arizona Department of Public Safety (DPS) entered into a Memorandum of Agreement (MOA) with ICE on February 26, 2007. According to DPS, the MOA authorizes up to 100 DPS officers to become cross-certified to perform certain immigration enforcement functions. Specifically, the MOA gives trained DPS officers the authority to do the following: 1) interrogate any person believed to be an alien as to that person’s right to be in the U.S. and process for immigration violations those individuals who are convicted of state or federal felony offenses; 2) arrest without warrant any alien attempting to unlawfully enter the U.S., or an alien in the U.S. if the officer has reason to believe the alien is in the U.S. in violation of law and is likely to escape before a warrant can be obtained; 3) arrest a person without warrant for any felony cognizable under any U.S. law regulating the admission, exclusion, expulsion or removal of aliens if there is reason to believe that the person has committed the felony and if there is a likelihood of the person escaping before a warrant can be obtained. Notification of such an arrest must be made to ICE within 24 hours; 4) serve warrants of arrest for immigration violations; 5) take and consider evidence to complete required criminal alien processing, including fingerprinting, photographing and interviewing aliens, as well as preparing affidavits and taking sworn

statements for ICE supervisory review; 6) prepare charging documents for certain aliens for the signature of an ICE officer; 7) issue immigration detainers for processing certain aliens; 8) detain and transport arrested aliens to ICE-approved detention facilities; and 9) access ICE computer databases to investigate and process aliens.

Ten sworn DPS Gang and Immigration Intelligence Team Enforcement Mission (GIITEM) officers graduated from the training program in May 2007. In addition, GIITEM intends to host the next regional training program in Phoenix and to enroll four additional GIITEM officers.

In September 2005, the Arizona Department of Corrections (ADC) entered into an agreement with ICE to train certain correctional officers to perform the following functions: 1) interrogate aliens in order to determine if there is probable cause for immigration violations; 2) complete required arrest reports and forms; 3) prepare affidavits and take sworn statements; 4) prepare immigration detainers and reports; and 5) prepare removal charging documents. To date, ICE has trained a total of 30 correctional officers.

According to ICE, in addition to the agreements with DPS and ADC, ICE also has MOAs with the Phoenix Police Department and the Maricopa County, Pima County, Pinal County and Yavapai County sheriffs' offices.

## **ADDITIONAL RESOURCES**

- U.S. Immigration and Customs Enforcement (the office within the U.S. DHS that includes enforcement and investigations)  
<http://www.ice.gov/>
- U.S. Citizenship and Immigration Services  
<http://www.uscis.gov/>
- U.S. Customs and Border Protection (the office within the U.S. DHS that includes the Border Patrol)  
<http://cbp.gov/>
- Arizona's Human Smuggling Law: Arizona Revised Statutes, Title 13, Chapter 23, § 13-2319

- Communication between government agencies and the Immigration and Naturalization Service (ICE): U.S. Code, Title 8, Chapter 12, § 1373 and Title 8, Chapter 14, § 1644
- Powers of immigration officers and employees: U.S. Code, Title 8, Chapter 12, § 1357
- City of Phoenix Mayor's Website  
[www.mayorgordon.com](http://www.mayorgordon.com)
- "Determination of Employment Eligibility by Employers"  
Arizona State Senate Issue Brief,  
[www.azleg.gov/briefs.asp](http://www.azleg.gov/briefs.asp)